THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)
	)
DELORES JUNIOUS	) OEA Matter No. 1601-0057-01C07
Employee	)
	)
v.	) Date of Issuance: November 15, 2007
	)
D.C. CHILD AND FAMILY SERVICES	) Muriel A. Aikens-Arnold
	) Administrative Judge
Agency	)
	)

Robert E. Deso, Esq., Employee's Representative
Andrea G. Comentale, Esq., Assistant Attorney General for the District of Columbia

ADDENDUM DECISION ON COMPLIANCE

INTRODUCTION AND PROCEDURAL HISTORY

On June 22,2001, Employee, a Social Worker, filed a Petition for Appeal from Agency's action to remove her effective April 20, 2001 based on employment-related conduct.[1] On October 25, 2004, an Order convening a Prehearing Conference was issued scheduling said conference on November 16, 2004. After two (2) postponements, based on requests by the parties, said meeting was held on February 1, 2005. On March 1, 2005, an evidentiary hearing was conducted, the parties submitted closing arguments, and the record was closed effective June 10, 2005.

On November 10, 2005, this Judge issued an Initial Decision (ID) in which it was concluded that Agency's action was not supported by a preponderance of the evidence. The removal action was reversed and Agency was ordered to reinstate Employee to her position of record with all back pay and benefits. Agency was further directed to file written verification with this Office regarding its compliance with said decision within thirty (30) days of the date on

[1] This Judge initially dismissed this matter on 10/07/03 based on Employee's failure to prosecute. However, upon further appeal to this Office, the Board issued an *Opinion and Order on Petition for Review* on 9/27/04, finding that, based on the evidence presented, remand for further proceedings was warranted. The specific charges are not repeated as the specifics are not pertinent to the outcome in this matter.

which the ID became final.. Agency did not file said notification. Nor did Agency appeal the ID to the Board or otherwise challenge this Judge's ruling in the District of Columbia Superior Court.

On August 3, 2006, Employee filed a Petition for Enforcement asserting that she had not been reinstated nor reimbursed back pay and benefits. On August 25, 2006, an Addendum Decision On Compliance was issued based on: 1) the fact that Employee had, indeed, returned to work effective July 24, 2006; and 2) the assurance of Agency Counsel that Employee's back pay and benefits were being processed at that time. However, on November 13, 2006, Employee filed a Second Petition for Enforcement (SPFE) stating that Agency had *not* fully complied with the ID and that she had *not* received back pay and benefits. Shortly thereafter, documents requested from Agency's Counsel and received by the Judge, reflected that Employee was issued a salary check for $178,813.12 on November 24, 2006; and a Back Pay Worksheet showed various monetary deductions for, *inter alia,* retirement and taxes, as well as benefits paid.[2]

On December 22, 2006, Agency filed its response to the Petition for Enforcement, in which Agency asserted, *inter alia,* the following:

> 1) That since Employee had not been active for more than five (5) years, she was required to undergo training including, but not limited to, current applications, policies, practices, laws and regulations before fully resuming her duties. Such training was *only* provided during the day shift where she was initially assigned upon reappointment.[3]
>
> 2) That it takes about four (4) weeks from a reinstatement for the payroll cycle to complete its course, and due to Employee's absence from a pay status for over five (5) years, the necessary information was not in the payroll system at the time of Agency's request Further, Employee failed to provide information regarding outside earnings.[4]
>
> 3) That Employee may only be reimbursed for pay and benefits permitted by law, Mayor's Order, regulation, or agency policy. Therefore, Employee is not entitled to overtime pay, training reimbursement, a bonus, promotion, or interest on the back pay.[5]

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[2] See Agency's Response to Petition for Enforcement (hereinafter referred to as "ARPFE"), Exhibits 3 and 4 (which represent identical documents previously provided) filed on 12/22/06. In addition to regular hours, total payments for night differential, holidays, and Sunday premium were reflected.

[3] This explanation was given, presumably, because Employee was assigned to the night shift, prior to her removal.

[4] At this point, Agency incorrectly cited "Exhibit 8" of Employee's SPFE, which does not exist.

[5] See Employee's SPFE, Exhibit 4 and ARPFE at pp. 3-5, where both parties cited various regulations

4) That promotions are not automatic; certain requirements under the District Personnel Manual (DPM), Chapter 8, Section 837 must be fulfilled; and it is speculative that Employee would have been promoted at any time during the five year period following her removal .[6]

On January 12, 2007, Employee filed a Reply to Agency's Response (ERAR), including an affidavit from Employee, to the SPFE stating, *inter alia,* that " . . . Agency has not implemented a 'make whole' remedy which restores Employee, as nearly as possible, to the *status quo ante* . . ."[7] Employee lists the following outstanding issues:

a) That Employee is entitled to overtime pay for the period of the erroneous separation during which Employee would have worked hours outside her regular midnight shift, eg., court appearances and other employment-related activities;

b) That the Union plan will not pay for dental benefits during the period that she was wrongfully terminated;

c) That Agency failed to promote Employee to Grade DS 0185-12 as required by its policy (Exhibits 3 and 4);

d) That Agency failed to properly compute Employee's retirement benefits to include compounded earnings over the five-year period of her wrongful termination;

e) That Agency failed to pay Employee a $2000.00 cash bonus; failed to assign Employee to the midnight shift where she previously earned more income; failed to reimburse Employee for outside training she attended during the period of wrongful termination; and

f) That Employee should be paid 6% interest per annum for the delay in issuing back pay for more than a year.[8]

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from CDCR 6-1149, Back Pay, to support their respective positions. Employee included, among other things, reimbursement for outside training, payment for overtime, and out-of-pocket medical, dental and optical expenses. Agency contends that Employee declined health insurance reimbursement and is, therefore, not entitled to reimbursement for those expenses.

[6] See ARPFE at p. 4.

[7] See ERAR at pp. 5-6.

[8] See ERAR at pp. 7-10.

On June 20, 2007, this Judge held a teleconference with the parties to further clarify issues various issues raised by Employee. For example: 1) how does Employee know whether her retirement was incorrectly computed; did Agency representatives explain how they arrived at the numbers used for deductions taken and the retirement computations; 2) verify the source and explain how the promotion policy works (see Exhibit 3); and 4) Employee must provide a rule, regulation, law, or legal opinion regarding this Office's authority to mandate a "make whole" remedy which addresses, *inter alia,* payment for overtime Employee would have worked during the time of her removal; and overriding DPM back pay regulations cited by Agency.[9]

On July 6, 2007, Employee filed a response to the teleconference discussion which included the following: 1) a formula to determine compounded retirement earnings; 2) a Board decision which supports Employee's "make whole" remedy argument; 3) self-authentication of the promotion policy Fact Sheet included as Exhibit 3 filed with her January 12, 2007 affidavit; and 4) Agency notification regarding Continuing Education units for Social Workers.

On July 16, 2007, Agency filed its response to the teleconference discussion by providing DPM, Chapter 8 regulations for career ladder promotions.[10] On July 19, 2007, Employee submitted a further response arguing that Employee met the basic criteria for promotion to DS-12, ie., served 1 year at the lower grade, had no unsatisfactory performance evaluations; and obtained her LICSW license in March 2004.

On August 23, 2007, an Order for Agency to Clarify Back Pay Issues was sent out, to which Agency responded. The record is closed.

JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code, Section 1-606.03 (2001).

ISSUE

Whether this compliance matter may now be dismissed.

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[9] During the teleconference, Employee's Counsel represented that Agency was notified regarding Employee's license as an Independent Clinical Social Worker (which is required for promotion from Grade 11 to Grade 12) prior to her reinstatement.

[10] See Agency Submission in Response to June 20, 2007 Conference Call (hereafter referred to as "ASRCC"), Exhibit 1, Section 837, Merit Promotion Requirements; Section 838, Time In-Grade Requirements; Exhibit 2, Memorandum dated 10/18/05 on CFSA's Career Ladder Promotion Practice.

ANALYSIS AND CONCLUSIONS

OEA Rule 636.7, 46 D.C. Reg. at 9322, states that in a compliance matter, the Administrative Judge "shall take all necessary action to determine whether the final decision is being complied with and shall issue a written opinion on the matter." If the Administrative Judge determines that the agency has not complied with the final decision, the matter shall be certified to the General Counsel for further action to ensure compliance.[11]

Compliance with the final decision for an unjustified personnel action, in this Judge's view, includes the payment of wages lost and restoration of employment benefits to which an employee is entitled. In this instance, where a District of Columbia agency is involved, the Back Pay Act (the Act) as outlined in the DPM, is applicable. Nevertheless, this Judge will also address collateral issues raised by Employee.

Pursuant to the Back Pay Act, Title 6, Government Personnel, Chapter 11, Classification and Compensation, the correction of an unjustified or unwarranted personnel action and entitlement to back pay includes, in pertinent part:

> (a) The following terms and meanings ascribed in Section 1149.1:
>
> Benefits - monetary and employment benefits to which an employee is entitled by law or regulation, including, but not limited to health and life insurance, and excluding pay as defined in this section.
>
> Nondiscretionary provision - any provision of law, Mayor's Order, regulation, personnel policy issued by the pay authority, or collective bargaining agreement that requires a personnel authority to take a prescribed action under stated conditions or criteria.
>
> Pay - the rate of basic pay or basic compensation as defined under the applicable pay system; pay increases; within grade increases; premium pay (including holiday, Sunday, night, administrative closing, and local environment pay); on-call pay; retained rates; and pay adjustments for District Service supervisors. For the purpose of this section, pay also means annual, sick, court, and military leave.
>
> (b) Section 1149.10 - When an appropriate authority corrects or directs the correction of an unjustified or unwarranted personnel

[11] *See* OEA Rule 636.8.

> action, the agency shall determine the employee's back pay entitlement by recomputing for the period covered by the corrective action the pay and benefits of the employee as if the unjustified or unwarranted personnel action had not occurred, but in no case shall the employee be granted more pay or benefits than he or she would have been entitled by law, Mayor's Order, regulation, or agency policy.
>
> (c) Section 1149.14 - An employee entitled to back pay under this section shall have included in the back pay computation any pay or benefit that the employee would have received, except that overtime pay shall not be included in the back pay award.

The right to return to status quo ante is not unconditional and does not require perfect consistency between all aspects of the pre- and post-removal positions. Employee contends that when the DPM regulations conflict with the rules of this Office, these rules prevail. Specifically, Employee claims that this Office is authorized, under its rules, to provide "appropriate relief." which conflicts with the DPM rules and regulations to, for example, exclude overtime.[12] However, "appropriate relief", in this Judge's view, does not conflict with the Act (as outlined in the DPM), but encompasses the Act.

The Act contains, *inter alia,* express provisions for monetary relief and employment benefits, to which an employee is entitled by law or regulation. While Employee contends that it was reasonable to believe that she would have worked mandatory overtime, such pay is specifically excluded from a back pay award. Moreover, no statutory mandate was cited, which specifically requires the inclusion of overtime pay in a back pay award, much less unconditionally mandates payment of collateral employment benefits. Consequently, there is no conflict between the DPM regulations and the rules of this Office, in this instance.[13]

Employee also contends that she be given a $2000.00 cash appreciation award that was given, in December 2001, to all employees who worked in her section prior to her wrongful termination. In its initial response thereto, Agency asserts that the Rewards and Recognition Program is evaluated annually based on employee eligibility and budget requirements Bonuses are not automatically awarded to all employees every year and Employee cannot assume that she would have received such recognition had she not been terminated.[14]

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[12] See OEA Rules 602.4 and 632.3(b).

[13] Employee cites various provisions of the D .C. Code, which authorize this Office to, *inter alia,* reverse or modify agency decisions and enforce compliance thereof. Employee further cites Equal Employment Opportunity decisions in support of her "make whole remedy". Yet EEO case law is based on specific congressional legislation that is not applicable or comparable to the circumstances here.

[14] See ARPFE at p. 4; See also Agency's Response to Clarify Back Pay Issues filed 10/2/07 (AR) at p.3

Employee further claims that, but for the erroneous removal action, she would have been promoted to grade DS-12 upon receipt of her LICSW in March 2004. An agency's decision to promote an employee is discretionary and this Office lacks the authority to order an agency to promote an employee absent a showing that the agency had a mandatory duty to promote him or her.[15] As reflected in DPM, Chapter 8, Sections 837 and 838, career ladder promotions are not guaranteed and such decisions are within the discretion of the supervisor.[16]

Upon her reappointment and prior to fully resuming her duties, Employee was required to undergo training on current Agency applications, systems, policies, regulations, etc., given by the Office of Training Services. During the period of her wrongful termination, Employee completed a number of training classes to otherwise maintain and improve her skills as a Social Worker. She now seeks reimbursement for said training. Agency asserts that a review of her training certificates reflects that they are not comparable to Agency's required Pre-Service Training curriculum. Moreover, pre-approval must be obtained for reimbursement of elective training.

Relative to Employee's retirement benefits, Agency records reflect that the District currently pays 5% of the base salary towards Employee's Defined Contribution Pension Plan. Across-the-board increases, which include Within Grade Increases and cost-of-living adjustments, were factored into the calculation of monies owed to Employee from the time of her termination to her reinstatement.[17] Any other retirement issues should be brought to the attention of Agency officials.

Last, the Back Pay provisions do not expressly or impliedly provide for payment of interest on a back pay award. Nor does this Office have jurisdiction over the Union's health insurance plan. Based on a review of the record, this Judge concludes that Agency is now in compliance with the final decision of this Office in the underlying matter. Therefore, this Judge concludes that this compliance matter may now be dismissed.

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[15] *See Whitt v. District of Columbia,* 413 A.2d 1301 (D.C. 1980); *Beckford v. Department of Human Services,* OEA Matter No. 1602-0023-88, *Opinion and Order on Petition for Review,* (May 22, 1992), __ D.C. Reg. __ ( ).

[16] See AR at p. 2 for further explanation regarding Employee's failure to meet minimum promotion requirements and her absenteeism rate since her return to duty which resulted in her supervisor's inability to fairly evaluate her performance.

[17] See AR at p.4.

ORDER

It is hereby ORDERED that the matter is dismissed.

FOR THE OFFICE:

MURIEL A. AIKENS-ARNOLD, ESQ.
Administrative Judge

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
WANDA HOSTON	)	OEA Matter No. 1601-0022-04AF07
Employee	)	
	)	
v.	)	Date of Issuance: December 14, 2007
	)	
D.C. PUBLIC SCHOOLS	)	Muriel Aikens-Arnold
	)	Administrative Judge
	)	

Debra D'Agostino, Esq., Employee Representative
Harriet Segar, Esq., Office of the General Counsel

ADDENDUM DECISION ON ATTORNEY FEES

INTRODUCTION AND PROCEDURAL HISTORY

On December 29, 2003, Employee, a Social Worker, filed a Petition for Appeal (PFA) from Agency's action to remove her effective January 30, 2004 based on her failure to possess a valid District of Columbia license to perform the duties of her position. Agency was notified to respond to said PFA, and in doing so, moved for dismissal based on the fact that Employee had filed a union grievance pursuant to the terms of the collective bargaining agreement..

On September 24, 2004, this matter was assigned to the undersigned Judge, who scheduled and held a Prehearing Conference on February 1, 2005. On February 23, 2005, Employee's Counsel filed a Motion for Summary Judgment based on the following: 1) that there were no genuine facts in dispute; and 2) that Agency was unable to show by a preponderance of evidence that Employee failed to possess the required District of Columbia Social Worker license to work for the D.C. Public Schools. Agency was given an opportunity to respond and did so. On April 7, 2005, this Judge issued an Initial Decision (ID) granting Employee's Motion for Summary Judgment and reversing Agency's removal action.

On May 13, 2005, Agency filed a Petition For Review (PFR) which was denied on January 26, 2007 and became a final decision.[1] On March 13, 2007, Employee (through her

[1]Agency's PFR raised the possibility that an additional examination was required for proper certification.

attorney) filed a Motion for Attorney Fees and Expenses in the amount of $15,788.84 from October 5, 2004 to March 2, 2007. Agency was, thereafter, given an opportunity to respond and did so on April 13, 2007[2]. The record is closed.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code §-606.08 (2001).

POSITIONS OF THE PARTIES

Employee's Position

Employee's Attorney (hereafter referred to as "Counsel") contends that Employee is the prevailing party and that the payment of reasonable attorney fees is in the interest of justice. Counsel represents that, as the lead attorney, the $225.00 hourly rate charged and the work performed are reasonable. Counsel further represents that she was supervised by James M. Eisenmann (JME), a former Principal of the firm ($445 per hour); and then by Joseph V. Kaplan, Principal of the firm ($375 per hour, after JME left the firm); that paralegals Steven M. Schultz (SMS) and Nicole D. Calliste (NDC) also assisted in representation and in preparation of fee reports; and that said fees are also reasonable. Total attorney fees requested are: Ms. D'Agostino, $13,375.00; Mr. Kaplan, $133.50; Mr. Eisemann, $1,800.00; Mr. Schultz, $11.50; and Ms. Calliste, $92.00. Further, Employee requests additional costs ($476.84) for such expenses as copying, faxing, and postage.[3]

Agency's Position

Agency contests five (5) individual legal fees requested by Employee's Counsel as

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The Board upheld the ID, however, finding that Agency failed to clearly show that Employee lacked the requirements to continue employment and, therefore, improperly removed her. Agency did not file any further appeal.

[2] On 4/13/07, Employee returned to work in her former position, but was not paid at the appropriate rate. Nor did Agency issue back pay or restore her leave benefits. On 5/18/07, Employee filed a Motion for Enforcement of Final Decision. In response, Agency advised that the review process was not complete and requested additional time until 7/9/07 to credit sick leave and generate a back pay check. On 10/9/07, a Order to Submit Documents Verifying Compliance was issued with a one week deadline for Agency to do so. On 11/1/07, Agency submitted documents reflecting pertinent personnel actions that were processed the same day, with an indication that the back pay check will be processed within 30 days.

[3] See Appellant's Motion for Attorney Fees and Expenses (hereafter referred to as "AMAF") at pp. 2-4. Counsel included reports summarizing time spent by each firm attorney and paralegal who participated in Employee's representation, and additional costs incurred.

unrelated to the matter before this Office and, therefore, should not be paid. The following details were cited:

Date	Service Performed	Time Spent	Amount
10/25/04.	Review fax from client re EEO complaint/request for financial assistance.	0:12:00	$27.00
12/13/04	Discussion w/JME re mediation order	0:06:00	$13.50
2/22/05	Discussion w/JME re order/status of OHR complaint	0:06:00	$13.50
6/3/05	Research pay rate change	0:36:00	$81.00
1/29/07	Draft case summary for publication	0:24:00	$54.00
Total		0:84:00	$189.00

ENTITLEMENT OF EMPLOYEE TO ATTORNEY FEES

D.C. Official Code § 1-606.08 provides that: "[An Administrative Judge of this Office] may require payment by the agency of reasonable attorney fees if the appellant is the prevailing party and payment by the agency is warranted in the interest of justice." *See also* OEA Rule 635.1, 46 D.C. Reg. at 9320.

1. Prevailing Party

"[F]or an employee to be a prevailing party, he must obtain all or a significant part of the relief sought . . ." *Zervas v. D.C. Office of Personnel*, OEA Matter No. 1601-0138-88A92 (May 14, 1993), __ D.C. Reg. __ ( ). *See also Hodnick v. Federal Mediation and Conciliation Service*, 4 M.S.P.R. 371, 375 (1980).

Here, the relief sought was the reversal of Employee's removal, restoration to duty in her former position, and reimbursement for loss of wages and benefits. That is the result Employee obtained. Moreover, Agency did not further appeal the Board decision, or otherwise imply the Employee was not in fact the prevailing party. Therefore, this Judge concludes that Employee is a prevailing party.

2. Interest of Justice

In *Allen v. United States Postal Service,* 2 M.S.P.R. 420 (1980), the Merit Systems Protection Board (MSPB), this Office's Federal counterpart, set forth circumstances to serve as "directional markers toward the 'interest of justice'-- a destination which, at best, can only be approximate." *Id.* at 435. The circumstances to be considered are:

1. Where the agency engaged in a "prohibited personnel practice";

2. Where the agency's action was "clearly without merit" or was

"wholly unfounded", or the employee is "substantially innocent" of the charges brought by the agency;

3. Where the agency initiated the action against the employee in "bad faith", including:

a. Where the agency's action was brought to "harass" the employee;

b. Where the agency's action was brought to "exert pressure on the employee to act in certain ways";

4. Where the agency committed a "gross procedural error" which "prolonged the proceeding" or "severely prejudiced the employee";

5. Where the agency "knew or should have known that it would not prevail on the merits" when it brought the proceeding.

id. at 434-35.[4]

As indicated above, this Judge found that Employee is the prevailing party. The ID became a final decision on January 31, 2007, five (5) days after the issuance date of the Board Order. Moreover, Agency's action was "clearly without merit" and Agency "knew or should have known" that it would not prevail when it initiated the action. In fact, the Board stated, in part: " . . .[T]his Board will not allow any agency to terminate an employee while using the

[4] "[T]here is no requirement that an applicant for attorney fees meet all of the above criteria in order to show 'interest of justice'." *Thomas v. Metropolitan Police Department,* OEA Matter No. 1601-0002-86AF89, 42 D.C. Reg. 5642, 5645 (1995).

appeals process to determine if they had reasonable grounds to do so."

Further, approximately seven (7) months after the issuance of the ID, Agency has *not* yet issued the back pay check for wages lost due to the unwarranted removal, and unduly delayed restoring Employee's leave benefits. The interest of justice is served by the award of attorney fees when the agency delays its compliance beyond the date set by the ID. *Harris v. Department of Agriculture, 40* MSPR 604, 610 (1989). Based on the circumstances, and under *Allen* factors 2 and 5, Employee is entitled to attorney fees in the interest of justice.

REASONABLENESS OF ATTORNEY FEES

This Office's determination of whether Employee's attorney fees request is reasonable is based on a consideration of the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980). Although it is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted, the fee application must contain sufficient detail to permit an informed appraisal of the merits of the application. *Copeland, supra.* The number of hours reasonably expended is calculated by determining the total number of hours and subtracting nonproductive duplicative, and excessive hours. *Henderson v. District of Columbia*, 493 A.2d 982 (D.C. 1985).

The burden is on the fee applicant to produce satisfactory evidence that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, or reputation. *Blum v. Stenson*, 465 U.S. 886 (1984). The best evidence of the prevailing hourly rate is ordinarily the hourly rate customarily charged in the community in which the attorney, whose rate is in question, practices. *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516 (D.C. Cir. 1988). Further, the Board has determined that the Administrative Judges of this Office may consider the so-called "Laffey Matrix" in determining the reasonableness of a claimed hourly rate.[5]

Counsel's submission included enumeration of the services provided on Employee's behalf, totaling $15,788.84 for 65 hours (including $476.84 in additional expenses). Also

[5] The *Laffey* Matrix, used to compute reasonable attorney fees in the Washington, DC-Baltimore Metropolitan Area, was initially proposed in *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*,746 F.2d 4 (D.C. Cir. 1984), *cert. denied,* 472 U.S. 1021 (1985). The fees are calculated by cross-referencing an "x-y" matrix reflecting the years in which the services were performed and the attorney's years of experience, yielding a figure that is a reasonable hourly rate (from June 1-May 31). It is updated yearly by the Civil Division of the U.S. Attorneys Office for the District of Columbia based on the change in the Consumer Price Index for All Urban Consumers (CPI-U) for Washington-Baltimore, DC-MD-VA-WV, then adjusted to the applicable *Laffey* rate for the prior year to ensure that the relationship between the highest rate and the lower rates remains reasonably constant. The current Laffey Matrix (1980-2007) is attached to this decision.

attached were three (3) affidavits reflecting summaries of attorney credentials, which included educational background, employment history, and professional experience of practicing law, particularly employment law.

1. Number of hours expended.

According to the billing documents submitted with the attorney fees motion, Counsel's billable hours total 65 for various services performed by herself, two (2) other attorneys, and two (2) paralegals. Said attorney fees, for work performed, are summarized as follows:.

Attorney	Hours	Amount
JVK (Principal)	.30 @$445	$ 133.50
DDA (Counsel)	59.00 @$225	$13,275.00
JME (Principal)	4.80 @$375	$ 1,800.00
NDC (Paralegal)	.80 @$115	$ 92.00
SMS (Paralegal)	.10 @$115	$ 11.50
Total	65	$15,312.00

Relative to Agency's response, this Judge agrees that the legal services cited (.84 hours) were unrelated to this matter, and therefore, unwarranted.[6] Therefore, said costs, in the amount of $189.00, should be subtracted from Ms. D'Agostino's total billing. Second, this Judge's review of Counsel's billing reflects that the amount of time for the following legal services was excessive and/or the legal services performed appeared to be unrelated to this matter:

11/08/04	Telephone call w/client re mediation, fee agreement, AJ's ruling	0:18:00
2/22/05	Telephone call w/client re hearing/OHR complaint	0:30:00
6/7/05	Discussion w/JME re brief	0:06:00
6/15/05	Revise brief	0:24:00[7]

[6] See Agency Response (AR) at p. 1.
[7] Due to Counsel's redaction of items not relevant (ie., Office of Human Rights (OHR) complaint) to this

6/15/05	Telephone call w/client re bill	0:06:00
6/16/05	Telephone call w/client re bill payment	0:12:00
1/30/07	Discussion w/JME re relief, settlement	0:06:00
2/2/07	Review fax from client re requested relief	0:06:00
2/2/07	Telephone call w/client re relief requested	0:06:00
Total		1:14:00

While this Judge was lenient with some discussions between Counsel and her supervisor(s) when said discussions *included* the OHR matter, the above listed services were not reasonable and/or necessary. Accordingly, this Judge, concludes that the 1:14:00 hours ($256.50) should also be subtracted from the total amount.[8]

Relative to Employee's request for attorney fees for Mr. Kaplan and Mr. Eisenmann, whose affidavits reflect an abundance of employment law experience, this Judge believes that in-house consultation does not warrant the award of attorney fees in this instance. Further, the *Laffey* Matrix reflects reasonable fees based on years of experience of the attorney who, in this Judge's view, personally performed services; and not duplicative services.[9] Last, Employee requests an award of paralegal fees at the hourly rate of $115 for .90 hours. However, there was no indication of any paralegal academic or professional training, or other legal-related credentials for the persons identified as "paralegals." Moreover, the Motion reflects that the paralegals "also assisted in representation and in preparation of the fee reports." Yet, there is no clear indication regarding the type(s) of legal services performed; and only a broad reference to "fee summaries" which are generated through a computerized billing program.[10] This Judge concludes, therefore, that fees in the amount of $103.50 are not warranted.

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matter, concerns arose regarding time spent relative to the "brief". Specifically, when Counsel cited time spent regarding Employee's response to Agency's "petition for review" (which was prepared around the same time period), said item was cited.

[8] Counsel requests payment for 59 hours in the amount of $13,275.00. The disallowed costs equal $445.50.

[9] The "Experience" column refers to the years following the attorney's graduation from law school.

[10] See Appellant's Motion For Attorney Fees at p. 4.

Reasonable Hourly rate.

In this instance, Counsel represented that she received her law degree in 2001, was admitted to the New York Bar in February 2002, and then began employment with Klimaski & Associates, P.C. performing litigation in various administrative forums. In May 2003, she began her current employment with Passman & Kaplan where she is "regularly [engaged] in all facets of litigation practice . . ." In October 2004, Counsel began her representation of Employee and, at that time had approximately two (2) years' experience which increased each subsequent year. Counsel provided the following customary hourly rates for the years in question:

2004	$175
2005	$190
2006	$205
2007	$215

Under the *Laffey* Matrix, Counsel asserts that the prevailing market rate for legal services, based on Counsel's experience, is as follows:

6/1/04-5/31/05	$190
6/1/05-5/31/06	$220
6/1/06-5/31/07	$225

A review of Counsel's credentials reflects that Counsel's legal experience began in 2002 with the aforementioned law firm. In 2004, she accumulated two (2) years' experience which amounts to an hourly rate of $185 in the *Laffey* Matrix. In 2005, she accrued three (3) years' legal experience which is reflected as $195 in the *Laffey* Matrix. In 2006, with four (4) years' legal experience, Counsel's reasonable fee, according to the *Laffey* Matrix, is $235; and in 2007, the fee increased to $245 for five (5) years' experience. An average of those fees equals $225 which Counsel, otherwise, contends is a reasonable rate.[11] Therefore, the total allowable fees for the legal services performed in the representation of Employee from October 5, 2004 through March 2, 2007 (minus disallowed costs) is $ 12,829.50.

3. Costs

In addition to the above legal fees, Employee requested compensation for costs totaling $476.84 to cover such expenses as postage and copying costs. In the absence of any dispute by Agency and based on a review of the billing statement, this Judge concludes that said costs

[11] The Judge's view of Counsel's legal experience apparently differs with Counsel's as the fees cited by both differ. Nonetheless, considering the totality of circumstances, the $225 amount is a reasonable hourly rate for the legal services performed in this matter.

claimed are reasonable and recoverable.[12]

The grand total, therefore, of allowable attorney fees plus costs is $ 13,306.34.

ORDER

1) It is hereby ORDERED that Agency pay Employee, within 30 days from the date on which this addendum decision becomes final, $13,306.34 in attorney fees and costs.

2) It is FURTHER ORDERED that Agency file with this Office, within 30 DAYS from the date on which this *Addendum Decision on Attorney Fees* becomes final, documents showing compliance with the terms of this addendum decision.

FOR THE OFFICE:

MURIEL AIKENS-ARNOLD, ESQ.
Administrative Judge

[12] It is well-settled in this Office that costs, if reasonable, are recoverable. *See e.g., Glee v. Department of Public & Assisted Housing*, OEA Matter No. 2405-0113-92A98 (April 28, 1998), __ D.C. Reg. __ ( ); *Brunatti v. D.C. Public Schools,* OEA Matter No. 2401-0165-93A00 (October 17, 2000), __ D.C. Reg. __ ( ).

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)
	)
PAUL D. HOLMES	) OEA Matter No. 1601-0014-07
Employee	)
	)
v	) Date of Issuance: October 3, 2007
	)
	) Muriel A. Aikens-Arnold
METROPOLITAN POLICE	) Administrative Judge
DEPARTMENT	)
Agency	)
	)

James W. Pressler, Jr., Esq., Employee's Representative
Thelma Brown, Esq., Assistant Attorney General for the District of Columbia

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On November 13, 2006, Employee, a Police Officer, filed a Petition for Appeal of Agency's action to remove him from his position effective October 6, 2006 for: 1) Conduct Unbecoming; and 2) Conviction On November 20, 2006, this Office notified Agency regarding this appeal and instructed Agency to respond within thirty (30) days. Agency filed its Answer to Employee's Petition For Appeal (PFA) as instructed.

This matter was assigned to this Judge on December 15, 2006. On January 10, 2007, an Order Convening a Status Conference on January 25, 2007 was issued.[1] Due to a postponement, said conference was held on January 31, 2007. During that meeting, the Judge discussed the review process and the fact that, in accordance with a decision made by the District of Columbia Court of Appeals, this Office is limited to a review of the agency record.[2] The parties were

[1] On 1/24/07, Agency's representative requested a postponement due to a conflict. That request was granted and the status conference was rescheduled.

[2] *See District of Columbia Metropolitan Police Department v. Elton L. Pinkard,* 801 A.2d 86 (D.C. 2002), in which the Court held, *inter alia,* that this Office erred in conducting a second evidentiary hearing when a Police Trial Board (PTB) hearing had previously been held in a disciplinary matter; and violated the Department's labor agreement which provides *solely* for a review of the PTB record on

directed to file briefs regarding their respective positions.[3] On February 6, 2007, an Order Closing the Record was issued giving both parties an opportunity to submit legal briefs. After several extensions were requested and granted, the record was closed effective May 7, 2007 at which time both briefs had been filed. The record is closed.

JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.03 (2001).

ISSUE

Whether the Agency action, based on the Police Trial Board (PTB) hearing, was supported by substantial evidence, whether there was harmful procedural error, or whether it was otherwise contrary to law or applicable regulations.

FINDINGS OF FACT

Statement of the Charges

By memorandum dated April 25, 2006, Employee was notified of a proposal to terminate his employment with the Department based on the following two (2) charges:

Charge No. 1: Violation of General Order Series 1202, Number 1, Part I-B-12, which provides: "Conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would affect adversely the employee's or the agency's ability to perform effectively, or violations of any law of the United States or any law, municipal ordinance, or regulation of the District of Columbia." This misconduct is defined as cause in Section

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appeal. The Court remanded the appeal to this Office to determine whether Agency's action was supported by substantial evidence, whether there was harmful procedural error or whether it was in accordance with law or applicable regulations. The Court further stated that "OEA, as a reviewing authority, also must generally defer to the agency's credibility determinations." *Pinkard* at pp. 91-92.

[3] Employee advised that he asserted his Fifth Amendment right against self-incrimination at the trial board hearing due to a related criminal investigation (after which no charges were filed); and requested that this Judge hear his testimony in this forum. That request was denied as this Judge is legally precluded from taking oral testimony when an evidentiary hearing was previously held at the agency level. Further, Employee was afforded an opportunity to testify even though, under the circumstances, he chose not to do so.

1603 of the D.C. Personnel Manual.

Specification No. 1: In that on December 20, 2005, Ms. Karmease Sha-ron Washington reported to Sergeant Kevin Rice of the Sexual Assault Unit that you sexually assaulted her approximately 14 years ago when she was 14 years old. She reported that you picked her and her friend up and took them to a motel in Prince George's County, Maryland and had sexual intercourse with them. Ms. Washington also told Officer David Jackson of the Sixth District that an officer had raped her. While the scout car was pulling up to the Sixth District Station, you came out to take Ms. Washington to another scout car. She identified you as being the officer that raped her and her friend approximately 14 years ago.

Specification No. 2: In that on December 20, 2005, Ms. Shanica Gwenith Mayo provided a statement to Detective Bruce Howard of the Sexual Assault Unit of the Prince George's County Police Department. She reported that when she was approximately 13 years of age, she had vaginal sex with you.

Specification No. 3: In that on December 21, 2005, you were interviewed by Detective Bruce Howard of the Prince George's County Police Department. By your own admission, you had sex with two females approximately 14 years ago. The females in question were Ms. Karmease Sha-ron Washington and Ms. Shanica Gwenith Mayo, who were both under age. Your actions at that time were both conduct unbecoming that of an officer and a disgrace to the Metropolitan Police.

Specification No. 4: In that on December 21, 2005, during an interview with members of the Office of Internal Affairs Division, you admitted that you stopped at the liquor store and purchased liquor for two under-aged girls. Your actions were in violation of the above General Order, in that you contributed to the aid of a minor by purchasing liquor for them.

Charge No. 2: Violation of General Order Series 1202, Number 1, Part-I-B-7 which provides: "Conviction of any member of the force in any court of competent jurisdiction of any criminal or quasi-criminal offense or of any offense in which the member either pleads guilty, receives a verdict of guilty or a conviction following a plea of nolo contendere or is deemed to have been involved in the commission of any act which would constitute a crime whether

or not a court record reflects a conviction. Members who are accused of criminal or quasi-criminal offenses shall promptly report or have reported to their commanding officers their involvement.." This misconduct is defined as cause in Section 1603 of the D.C. Personnel Manual.

Specification No. 1: In that on December 21, 2006, you were named as a suspect in a criminal allegation of "Second Degree Rape" by the Prince George's County Police Department in Maryland.

Employee was given an opportunity to submit a written response and to request a trial board hearing before a three-member panel. Employee requested a hearing, which was held on July 27, 2006, after which the panel found him guilty of all charges, except Charge No. 1, Specification No. 3, and recommended the penalty of removal.[4]. On August 31, 2006, Assistant Chief of Police Shannon P. Cockett issued a decision, affirming the panel recommendation to remove Employee, effective October 13, 2006. On October 2, 2006, Chief of Police, Charles H. Ramsey denied Employee's final appeal of the adverse action.[5]

POSITIONS OF THE PARTIES

Employee's Position.

Employee makes three arguments: 1) That Agency did not allow for a full evidentiary hearing when Employee was the subject of an active criminal investigation; 2) That Agency's finding that Employee engaged in conduct unbecoming an officer is not based on substantial evidence; and 3) Agency's finding that Employee is guilty of a crime was premature and was not based on substantial evidence.

First, Employee asserted his Fifth Amendment right against self-incrimination to be silent before the PTB panel, arguing that police officers should not be forced to choose between offering self-incriminating statements or job forfeiture; and that the "adverse action hearing should have been continued to afford Officer Holmes the opportunity to defend himself at a time when his Fifth Amendment rights were no longer in jeopardy."[6] Second, the record evidence is

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[4] See Agency Exhibit 5 attached to Agency's Brief (hereafter referred to as "AE" and "AB") filed on 5/2/07. The PTB panel recommended dismissal of said specification as redundant to Charge No. 1, Specifications numbered 1 and 2.

[5] See AE -6 and AE-7.

[6] See Employee's Brief (hereafter referred to as "EB") filed on 4/5/07 at pp. 8-9, citing *Garrity v. New Jersey,* 385 U.S. 493, 87 S.Ct. 616 (1967) where "[T]he Court reasoned that the choice between remaining silent and losing their livelihood violated the officers' Fifth Amendment right to remain silent." See also Agency's General Hearing Rules with Title 5, Subchapter XIV, § 5-127.01, and Title

inconclusive, the complaining witnesses were not credible, and the weight of the evidence clearly does not support a finding that the alleged misconduct occurred subsequent to Employee's appointment in July, 1990. Third, Employee was not indicted or charged for the alleged crime reflected in Charge No. 2, which was based on a criminal conviction. Further, the record lacks substantial evidence to satisfy the elements of "Second Degree Rape", ie., the date that the alleged sexual misconduct occurred and the ages of the alleged victims.[7] Based on the foregoing reasons, Agency's action must be set aside.

Agency's Position.

Agency contends that it met its burden of proof by a preponderance of evidence; that Employee's conduct significantly diminished his value as a Police Officer; that his continued employment undermines the integrity of the agency and does not promote the efficiency of the service. In response to Employee's first argument, Agency asserts that a full evidentiary hearing was conducted consistent with applicable law, rule, regulation and policy. Specifically, Agency contends: that Employee requested the administrative hearing (with knowledge of the pending criminal allegations); that Employee was not compelled to testify and no adverse inference was drawn from his silence; that Employee's representative did not object to the administrative hearing going forward, did not request a postponement, and fully participated in every aspect of the proceeding, to which Employee consented. Further, there is no record that Employee was told that his failure to testify could or would result in his removal.[8]

Relative to Employee's second argument, Agency asserts that Employee's efforts to raise doubt regarding the facts and the credibility of witnesses are nothing more than a disagreement over the findings. Agency reconciled factual conflicts to determine that there was substantial evidence in the record to support findings that the events took place when both complaining witnesses were minors; and, therefore, the PTB panel's conclusions were legally sufficient to support the decision and flowed rationally from the findings. Last, Agency argues that the penalty was warranted and appropriate to maintain discipline within the Department, and to maintain the efficiency of the service and the integrity of its police officers.[9] Agency requests

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6A, DCMR, Chapter 10 Disciplinary Procedures, § 1000.2 which, *inter alia,* provides the accused an opportunity to be heard in his defense, against written charges, prior to any removal action.

[7] See EB at pp. 10-14.

[8] See AB at pp. 4-5, 9.

[9] See AB at pp. 6-9; Agency cited various legal precedent regarding the substantial evidence standard as well as the elements comprising the standard for appellate review of a final agency decision. Substantial evidence is defined as such relevant "evidence that a reasonable mind might accept as adequate to support a conclusion." *Black's Law Dictionary,* Eighth Edition. Agency also cited *Douglas v. Veterans Administration,* 5 MSPB 313 (1981) to support its argument that the penalty was appropriate. *Douglas* established a 12-prong test for evaluating the appropriateness of a penalty. Hence the name "Douglas factors."

that its decision in this matter be affirmed.

ANALYSIS AND CONCLUSIONS

Whether Agency's Action Was Taken For Cause.

D.C. Official Code §1-616.51 (2001) requires the Mayor, for employees of agencies for whom he is the personnel authority to "issue rules and regulations to establish a disciplinary system that includes," *inter alia*, "1) A provision that disciplinary actions may only be taken for cause; [and] 2) A definition of the causes for which a disciplinary action may be taken." The action herein is under the Mayor's personnel authority. Said regulations were published by the D.C. Office of Personnel (DCOP) published at 47 D.C. Reg. 7094 *et seq.* (September 1, 2000). Section 1603 sets forth the Definitions Of Cause: General Discipline.[10]

In an adverse action, this Office's Rules and Regulations provide that an agency must prove its case by a preponderance of the evidence. "Preponderance" is defined as "that degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue." OEA Rule 629.1, 46 D.C. Reg. 9317 (1999).[11]

The Hearing Issue

Employee contends that, in the absence of his testimony before the PTB panel, he did not

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[10] The list of causes in §1603.3, in pertinent part, is as follows:

> . . . "cause" means a conviction . . . of another crime (regardless of punishment) at any time following submission of an employee's job application when the crime is relevant to the employee's position, job duties, or job activities; any knowing or negligent material misrepresentation on an employment application or other document given to a government agency; any on-duty or employment related act or omission that the employee knew or should reasonably have known is a violation of law; any on-duty or employment related act or omission that interferes with the efficiency or integrity of government operations; and any other on-duty or employment related reason for corrective or adverse action that is not arbitrary or capricious."

Section 1603.4 reads, in pertinent part, as follows: "With regard to any uniformed member . . . of the Metropolitan Police Department . . . "cause" also means the following, whether occurring on or off duty: (a) Any act or omission which constitutes a criminal offense, whether or not such act or omission results in a conviction . . ."

[11] In accordance with *Pinkard*, Agency's burden of proof must meet the "substantial evidence" test, which is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Davis-Dodson v. District of Columbia Dep't of Employment Services,* 697 A.2d 1214, 1218 (D.C. 1997).

receive a full hearing in violation of applicable law and Agency's hearing procedures, which provide an opportunity to be heard *prior to* issuance of a final decision to remove the individual from the police force.[12] However, this argument is flawed for several reasons. First, there is no dispute that the use of coerced statements made, in the employment setting, would likely be suppressed in a criminal proceeding. *See Garrity, supra.* Second, while administrative agencies, as a general rule, do not impose criminal penalties, this Judge recognizes the privilege against self-incrimination. Nevertheless, Employee made a choice *not to testify* before the panel when he had the opportunity to do so; and with the knowledge that his prior written statements and oral interviews with agency and other law enforcement officials were a part of Agency's record.[13]

Moreover, there is no evidence, written or otherwise, that Employee requested a postponement of the hearing until the criminal matter was resolved or for any other reason. A review of the hearing transcript reflects the following discourse, in pertinent part, between the Chairman and Employee's Counsel:

MR. VAUGHT: . . . my client . . remains in jeopardy in the criminal sense . . . under the circumstances, a Fifth Amendment privilege attaches. And I am bringing it up right now just so that before we commence we have that understanding and if there is disagreement or questions regarding that situation, I guess I am bringing it up right now to air that issue . . .

CHAIRMAN PENDERGAST: . . . to be clear, do you or do you not intend to have him testify?

MR. VAUGHT: I intend, at this point -- now, of course, it remains his call, but I intend at this point in time to advise him to avoid at all cost jeopardizing the criminal case . . . and to elect not to testify.[14]

Last, as Agency correctly asserts, Employee's representative " . . did not object to the administrative hearing going forward and, in fact, fully participated in every aspect of the proceeding."[15] There is no evidence to show otherwise. Based on consideration of the record,

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[12] See footnote 6.

[13] See EB at pp. 3-4; also AE-3 (Hearing Transcript) and AE-4 (Final Investigative Report with attachments).

[14] See PTB Hearing Transcript (hereafter referred to as "PTBHT") at pp. 11-13; also § 1000.7 which reads, "If a continuance is desired, the accused shall make application therefore . . . in writing at least twenty-four (24) hours prior to the time set for the hearing." .

[15] See AB at p.4.

this Judge concludes that Agency conducted a full hearing and did not violate any law or applicable regulation in so doing.[16]

The Substantial Evidence Issue

The question is not what the court would believe on a *de novo* appraisal, but whether the administrative determination is supported by substantial evidence on the record as a whole, including evidence supporting as well as that offered in opposition to the agency's finding. *Boylan v. USPS,* 704 F.2d 573 (11th Cir. 1983). Further, this Office is not in a position to make a *de novo* decision on the weight of the evidence. *DeCicco v. United States,* 677 F.2d 66, 70 (Ct. Cl. 1982). However, the entire record is reviewed to determine whether there are factors, such as "exaggeration, inherent improbability, or errors" which detract from the weight of that particular evidence. *Spurlock v. Dept. of Justice,* 894 F.2d 1328, 1330 (Fed. Cir. 1990).

Employee contends that the weight of the evidence does not support a finding that the alleged misconduct occurred subsequent to Employee's appointment to the Department in July, 1990. Specifically, Employee argues that: 1) Ms. Washington's testimony conflicted with prior statements to investigators, and therefore, is neither reliable nor supported by substantial evidence; and 2) Employee was on active military duty in Operation Desert Storm in December 1990 which was "completely ignored" in the findings and conclusions of the PTB panel.

First, Employee's argument regarding Ms. Washington's credibility, is based, in part, on representations made by investigators that Ms. Washington gave varying periods of time when this incident occurred. However, Ms. Washington's testimony, on cross-examination, was consistent with her prior written statement taken on December 20, 2005, in which she clearly stated that the incident occurred in December, 1990.[17] As previously stated, this Office must generally defer to the agency's credibility determinations. Thus, the appeals court has held:

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[16] See Also, see §1001.6, which reads, in pertinent part, "The fact that a member of the force has been charged with and is awaiting trial for a criminal offense involving matters *prima facie* prejudicial to the reputation and good order of the force, in this or any other jurisdiction, shall not be a bar to his or her immediate trial by a police trial board."

[17] See PTBHT at p. 119; also AE-4 (attachments 5 and 9) where Ms Washington's statement reflects, in part, at p.3 of 10, "[I]t was cold, our Christmas tree was up, and we had gifts under our tree. I know it was cold cause we had big coates (sic) on." Although Ms. Washington indicated in a second interview/statement on 12/29/05 that she was then twenty-nine years old and was thirteen years old when this incident occurred, the panel was entitled to determine the witness' credibility. Even though Employee did not know the date when this incident occurred, he indicated (among other things) in his written statement, dated 12/21/05, that he was employed by the Department and was off-duty when this incident occurred; did not know that one of the girls was thirteen years old; and that they appeared to be in their mid-twenties.

> That some parts of a witness' testimony may be attacked is a common phenomenon It supplies no basis, however, for holding that the fact-finder is not entitled to credit other parts of a witness's testimony. Where, as here, the presiding official expressly found a witness . . . credible, this court cannot substitute a contrary credibility determination on a cold paper record.[18]

Second, Employee asserts that he " . . . could not have been in a motel room in Prince George's County, as he was in (sic) active military duty in Operation Desert Storm." To support this proposition, Employee relies upon the testimony of Detective Howard that, during his interview, Employee stated he was deployed to Operation Desert Storm "sometime in the time frame from late 1990 through mid-1991." In addition, Employee presented a DD Form 214, Certificate of Release Or Discharge From Active Duty reflecting, *inter alia,* a period of active duty during the time period in question. Nevertheless, without knowing the mental processes followed by the panel in its consideration of this evidence, this Judge notes the absence of military orders to demonstrate that Employee's duty assignment was outside of the United States during that time. Rather, the DD Form 214 reflects a local duty assignment located in Washington DC during that time period. Further, Employee presented a Department training transcript and letter reflecting that he attended the Recruit Training Program (approximately 650 hours of instruction) at the Institute of Police Science from July 2, 1990 through August 23, 1991.[19]

Third, Employee contends that Agency's finding that he was guilty of a crime was premature and *not* based on substantial evidence. While Employee was not charged with or convicted of a crime, the evidence demonstrated that he was "deemed to have been involved in the commission of an act which would constitute a crime whether or not a court record reflects a conviction." Here, the panel concluded, based on the entire record, that Employee engaged in unlawful acts. Whether one of the females involved was thirteen or fourteen years old, at the time of the event, was only consequential in determining any legal charges. Of primary significance, to the panel, was the fact that both women were, by law, under the age of consent when the incident occurred.

The PTB panel relied upon the evidence of record, including the testimony of witnesses, and concluded that Employee was guilty of all charges and specifications, except Charge Number One, Specification Number 3. Specifically, the panel found that, *inter alia,* Employee's conduct was unacceptable, that Employee admitted that he engaged in conduct not suitable for a member of the Department, and that his admission throughout investigations conducted by the

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[18] See footnote 2; also *DeSarno v. Dept. of Commerce,* 761 F.2d 657 (Fed. Cir. 1985), following *Griessenauer v. Dept. of Energy,* 754 F.2d 361 (Fed.Cir. 1985).
[19] See EB at p. 12; PTBHT at p. 157; also, EB, Exhibits 3 and 4.

Department and law enforcement authorities in Maryland cannot be denied. Further, consideration was given to the so-called *Douglas* factors, as well as character witness testimony.

As part of its Findings of Fact, the panel specifically cited the aforementioned testimony (ie., Operation Desert Storm) and stated "After very carefully considering all the testimony, and other relevant evidence in the case at hand, the Panel determined that, by a preponderance of evidence, the following facts were established." The charges and specifications were then listed, each followed by the outcome; and a unanimous recommendation for removal as the penalty. Therefore, this Judge concludes that the panel considered the whole record and that Agency's proof of its charges against Employee by a preponderance of the evidence was supported by substantial evidence.

Whether the Penalty Was Appropriate Under the Circumstances.

When assessing the appropriateness of the penalty, this Office is not to substitute its judgment for that of the agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment." *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 1915, 1916 (1985).

The PTB found such aggravating factors as follows: the nature and seriousness of the offense; Employee's admitted involvement with the two young ladies, during the course of the investigation; his position of prominence and constant contact with the public; and his reputation, in the community, as a trusted public servant, was eroded. Relative to mitigating factors, the panel considered Employee's performance on the job, as a good, hard-working officer; however, the potential for rehabilitation did not exist, under the circumstances. Neutral factors that were considered by the panel included: the absence of prior discipline; and the consistency of the penalty which was in line with those imposed upon other employees for similar offenses, as well as Agency's table of penalties.

Selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office. As a trained police officer, he knew or should have known that his poor judgment was in violation of the laws he was sworn to uphold and would bring discredit to the Department. Based on the totality of circumstances, this Judge finds no reason to disturb the penalty which was within the parameters of reasonableness. Agency's action was not an error of judgment, and should be upheld.

ORDER

It is hereby ORDERED that Agency's removal is UPHELD.

FOR THE OFFICE:

MURIEL A. AIKENS-ARNOLD, ESQ.
Administrative Judge

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)
	)
DONALD MILTON	) OEA Matter No. 1601-0019-05
Employee	)
	)
v.	) Date of Issuance: July 31, 2007
	)
DEPARTMENT OF PUBLIC WORKS	) Muriel A. Aikens-Arnold
Agency	) Administrative Judge
	)

Barbara B. Hutchinson, Esq., Employee's Representative
Ross Buchholz, Esq., Assistant Attorney General for the District of Columbia

INITIAL DECISION

INTRODUCTION AND BACKGROUND

On January 25, 2005, Employee, an Engineering Equipment Operator, RW-11, filed a Petition for Appeal of Agency's action to remove him effective January 7, 2005 for: Incompetency - revocation of state or District of Columbia permit or license required to perform part or all of your duties. On January 25, 2005, this Office notified Agency regarding this appeal and instructed Agency to respond thereto within thirty (30) days. After requesting and receiving an extension of time until March 9, 2005, Agency so responded.

This matter was assigned to this Judge on August 23, 2005. On December 7, 2005, a Prehearing Conference was held to discuss issues and to schedule a hearing on January 31, 2006.[1] The evidentiary hearing was held over a five-day period (January 31, 2006, February 21, 2006, April 4, 2006, May 2, 2006, and July 7, 2006). By November 9, 2006, all hearing transcripts had been received and copies were provided to the parties. Thereafter, the parties submitted closing arguments and the record closed effective January 24, 2007.[2]

[1] An initial Order was issued on 10/31/05 scheduling the conference on 11/22/05. However, due to Employee's subsequent retention of counsel, who requested additional time to prepare, said meeting was continued without any objection by Agency.
[2] Two (2) extensions of time were granted upon Agency's request.

JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.03 (2001).

ISSUE

Whether the penalty was appropriate under the circumstances.[3]

PROCEDURAL HISTORY, STATEMENT OF CHARGES, AND PARTY POSITIONS

By memorandum dated November 17, 2004, Employee was notified of a proposal to terminate his employment based on the following charge: Incompetency - revocation of state or District of Columbia permit or license required to perform part or all of [his] duties. The details in support of the proposed action are stated below:

> During a check of driver's licenses of all employees whose job requires that they have a valid driver's license, it was revealed that your license was revoked on July 14, 2004 and has not been restored. You were granted an opportunity to clear up the records in a letter dated October 21, 2004. Since you have failed to provide documentation that this matter has been resolved and your license restored, this removal is being proposed.[4]

On December 30, [2004], a notice of final decision was issued sustaining the removal of Employee effective January 7, [2005], based on the evidence of record, written responses from Employee, AFGE Local 631 and AFGE Local 2091, and the recommendation report of the hearing officer.[5]

Employee's Position.

Employee contends that Agency's action to remove Employee was based upon a clear

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[3] See OEA Rule 629.1 which provides that the burden of proof with regard to material facts shall be by a preponderance of evidence. Employee does not dispute the underlying fact that his driver's license, which was required to perform his duties, was revoked. Therefore Agency met its burden by a preponderance of evidence that the charge of Incompetence constituted cause to initiate an adverse action and is not an issue.

[4] See Agency Exhibit (hereafter referred to as "AE") -3. The remainder of the notice provided procedural rights, including the appointment of a hearing officer to conduct an administrative review and make a recommendation to the deciding official.

[5] See AE numbered 1-A, 1-B, and 1-C. On 1/10/05, Agency issued a letter amending the erroneous dates in the decision letter. That letter was erroneously dated "December 30, 2005" with an erroneous effective date of "January 8, 2004."

error and was in violation of the Agency's policy. First, Employee argues that Agency policy required referral to rehabilitation for a first off-duty offense for drugs or alcohol use. Second, Agency was obligated to reassign Employee to a vacant position "if the license problem could not be resolved," consistent with a Memorandum of Agreement (MOA) between the Department and two (2) unions representing employees therein.[6] Although Employee does not dispute that his license was revoked, he argues mitigation of the penalty in that he was unaware of the license revocation until he was subsequently informed by management; and that he made efforts to remedy the problem and could not do so. Thus, Agency's failure to abide by the MOA requires reversal of Employee's termination.[7]

Agency's Position.

Agency contends that removal was the appropriate penalty based on Employee's inability to perform all or part of his required duties due to the revocation of his driver's license due to a conviction for Driving While Intoxicated. Further, Employee had knowledge of his driver's license (and CDL) revocation and the duty to report same to management. Yet, Employee concealed his license revocation while continuing to operate heavy equipment, and endangering the safety of co-workers and the public. Employee violated Agency regulations and U.S. Department of Transportation requirements, subjected the District to significant liability exposure, and had a work history of an unreported accident and a 15-day suspension for improperly operating equipment by assisting in fueling in violation of express instructions not to do so.[8]

Summary of Material Testimony

William Howland, Director, Department of Public Works (Deciding Official)

Mr. Howland testified that Agency annually checks the validity of driver's licenses of all employees who are required to drive; and those who are required to have commercial driver's licenses (CDL's) are required to immediately self-report if their licenses become invalid. The policy is the same for (state) driver's licenses. If employees self-report, efforts are made to place them in non-CDL positions. Otherwise, employees who do not self-report are dismissed.[9]

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[6] See Employee Exhibit (hereafter referred to as "EE") -1. The MOA was entered into between the D.C. Department of Public Works/Office of Administrative Services (OAS) and the American Federation of Government Employees (AFGE) Local 631, and the American Federation of State, County and Municipal Employees (AFSME) Local 2091, on January 23, 2002.

[7] See Employee's Closing Brief (hereafter referred to as "ECB") at pp. 3, 5-8.

[8] See Agency's Closing Brief (hereafter referred to as "ACB") at pp. 2, 5, 10; AE-6, Title 49, Transportation, Subtitle VI, Motor Vehicle and Driver Programs, Part B, Commercial, Chapter 313, Commercial Motor Vehicle Operators, Section 31303, Notification Requirements.

[9] See hearing transcript dated 1/31/06 (hereinafter referred to as "Tr.-Vol. 1") at pp. 55, 58-60

Although this witness was not familiar with the MOA regarding employees required to have CDL's, he was aware of two (2) employees with CDL's, who management attempted to reassign to other positions.[10]

Disqualifications are typically based on medical reasons and are distinguished from license suspensions or revocations based on actual driving/moving violations. Although he did not initially recall taking disciplinary action or transferring any motor vehicle operators because they had not resolved CDL problems, he subsequently testified that one employee, whose CDL was disqualified, was terminated after attempts were made to place him somewhere else.[11]

In October 2004, letters were sent to all employees, including Employee, who had license issues to be resolved. However, the initial letter to Employee was issued in error as he was not entitled to any opportunity to correct his license revocation issue. Nevertheless, a second letter was issued to Employee, in mid-November, allowing him time to resolve his problem.[12]

On cross-examination, Mr. Howland testified as follows: There was no self-disclosure regarding Employee's license revocation, which was serious enough to warrant termination. The limited period of revocation did not make a difference in this instance. He wasn't sure why the license was revoked, other than knowing it was a driving violation. However, his concern was for the safety of the Department and the public. For a number of months, Employee operated "heavy equipment that could have endangered other employees or the public and [he] did not disclose that he was operating it while not licensed."[13]

Consideration was given to the Hearing Officer's report and recommendation, written responses from Employee, Employee's past work record, his length of service, that he knew he was required to keep his CDL in good standing and he did not do so. Thus, termination was the only appropriate sanction for his actions. Mr. Howland was not aware of any other employee who had his CDL revoked.[14]

Barbara Milton (President, AFGE Local 631)

Ms. Milton testified that she negotiated and drafted the MOA with Kevin Green at the time that Agency started reviewing Employee licensing. Upon her request, Mr. Green subsequently issued a written interpretation of same on February 3, 2005.

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[10] See Tr.-Vol. 1 at pp. 67-68.
[11] See Tr.-Vol. 1 at p. 72, 76, 90-92.
[12] See Tr.-Vol. 1 at pp. 95-97. Based on information that Employee did not receive the first letter, a second letter was issued to him.
[13] See Tr.-Vol. 1 at pp. 105-107, 111, 119.
[14] See Tr.-Vol. 1 at pp. 111-112, 115-118.

On cross-examination, Ms. Milton testified that, according to Section four (4) of the Agreement, when a license is revoked, there was no time allowed, " . . . Agency would take immediate action , which is spelled out in [Section] number five and [Section] number six on the next page." If Agency could not find an employee another job, "either reassignment or a job that ended up in a reduction in pay . . . they would be terminated." Ms. Milton distinguished a license problem where there was "No license ever issued" for which no time was allowed and provided "immediate action to terminate" [in Section 4] versus a revocation for which no time was allowed [in Section 4] which triggers a step-by-step process established [in Section 6] to reassign *or* reduce the employee's pay *before* taking action to terminate the employee (emphasis added).[15]

James Ivy (President, (AFSCME, Local 2091)

Mr. Ivy's understanding regarding paragraph four (4) of the MOA was that, considering mitigating circumstances, Agency had three (3) options: reassignment, reduction in pay or termination when a driver had his CDL revoked. There was no requirement to follow a step-by-step process[16]

On cross examination, Mr. Ivy testified that he had conversations back and forth with Mr. Green to clarify specific issues relative to the MOA. He understood that Section six (6) was applicable to license problems listed in Section four (4) for which time was allowed to remedy same.[17]

Bertha Guerra (Labor Liaison)

Ms. Guerra testified that she attended all discussions regarding the terms and conditions of the instant labor contract. It was her understanding that when an employee's license was revoked, Agency had a choice of three (3) options: reassignment, reduction-in-pay or termination.[18]

On cross examination, Ms. Guerra testified that she attended two (2) meetings; one to review the procedure and the second one when an agreement was discussed, reached and signed. She was not involved in the intermediate discussions prior to signing the MOA. However, she edited and formatted the final document.[19]

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[15] See hearing transcript dated 2/21/06 (hereafter referred to as "Tr.-Vol. 2") at pp. 12-16, 20-31; also EE-1, Memorandum of Agreement dated 1/23/02.
[16] See Tr.-Vol. 2 at p.58. Mr. Ivy also signed the MOA, assuming that was everybody's understanding.
[17] See Tr.-Vol. 2 at pp. 63-64, 67, 72, 75. Upon examination by the Judge, the witness affirmed his previous testimony regarding the Employer's options.
[18] See Tr.-Vol. 2 at pp. 79-82.
[19] See Tr.-Vol. 2 at pp. 86-92.

Kevin Green (former Administrator, Office of Administrative Services)

Mr. Green testified that, in collaboration with a number of unions and staff members, he discussed, drafted and executed the aforementioned MOA, under which there is no time allowed to remedy a license revocation problem and no requirement to offer another position to an employee whose license has been revoked.[20] Section six (6) of the MOA allows an employee, who has license problems listed in Section four (4) to be transferred into a vacant position during the time allowed to remedy the problem. " . . . this is the key, during the time allowed." However, there is no time allowed to remedy a revoked license under Section four (4), therefore, immediate action must be taken in accordance therefore. "[B]ut, typically, one of the three (3) choices was at management's discretion." In doing so, management considers the employee's history, including any other concerns or past problems. The reassignment allowed, pursuant to Section six (6) "is not with respect to [a] license revoked . . . you always go back to the time allowed . . . the time allowed means you always go back to paragraph four (4) . . .."[21]

Thomas Henderson (Administrator, Solid Waste Management Administration)

Mr. Henderson, the proposing official, testified that, during a routine check, Agency learned that Employee's driver's license had been revoked without its knowledge. On October 21, 2004, Employee was sent a letter advising him, *inter alia,* that he was afforded fifteen (15) days to get his driver's license reinstated.[22]

In determining that termination was the appropriate penalty, the following factors were considered: Employee did not have the minimal qualifications to do the job as his driver's license was not reinstated in the period of time he was given to do so; he had an obligation, based on Department of Transportation regulations, to inform his supervisor that he no longer had a driver's license; his nondisclosure created a significant liability problem for the District; and his recent work history which included an unreported accident and a 15-day suspension for work performance.[23]

On cross examination, Mr. Henderson testified as follows: When he proposed Employee's removal, he was aware that Employee's driver's license was revoked for 180 days; that he followed the MOA guidelines; and that he did not look for a vacant position. He's not

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[20] See hearing transcript dated 4/4/06 (hereafter referred to as "Tr.-Vol. 3") at pp. 8-10.
[21] See Tr.-Vol. 3 at p. 11, 23-25; and EE-6.
[22] See Tr.-Vol. 3 at pp. 38-40; AE-3 and 4. A similar letter was previously sent by certified mail on 9/29/04, but not retrieved; and a copy subsequently faxed to Ms. Milton. The file copy of this letter reflects that Employee refused to sign an acknowledgment of its receipt. Employee was further advised that he would be given temporary work assignments during the 15-day period, and that failure to provide documentation by 11/5/04 would result in further action up to and including termination.
[23] See Tr.-Vol. 3 at pp. 46-47, 51, 55.

sure when, but he remembers seeing documents reflecting Employee's efforts to seek reinstatement of his license, which had been denied by the judge. Between January 1, 2003 and January 1, 2005, more than two (2) employees had their driver's licenses disqualified or revoked and subsequently reinstated within the required time frames given. Mr. Henderson was the deciding official when Employee was suspended from duty in September 2004 for his failure to follow instructions in two (2) instances.[24]

On redirect examination, Mr. Henderson testified that Employee's operation of heavy equipment, without a license, was dangerous to other agency and commercial trucks who enter and drop off disposal material at Agency's transfer stations.[25]

Donald Milton

Employee testified that, sometime in September, 2004, Supervisor Peter Mitchell asked whether there was a problem with his license. He responded, " . . . I told him there was no problem . . . I have to go to court . . . it may be pending suspension, but at this time, I am not suspended."[26] On that same day, Mr. Mitchell stopped Employee from operating motorized equipment at work Employee maintains that he did *not* receive the revocation notice until his visit to the Department of Motor Vehicles, which followed his conversation with Mr. Mitchell. Employee had previously been arrested for Driving While Under the Influence, pled guilty in court and had a hearing at Traffic Adjudication regarding the status of his driver's license. Although Employee admits that, at the time he left said hearing, he "may not have been paying attention . . ."; he did not know that his license was revoked and was "driving to work and around town every day . . . [I] was wondering why nobody took my license." Employee, thereafter, submitted a letter to Traffic Adjudication requesting a temporary license to drive back and forth to work, and during his tour of duty. That request was denied.[27] However, on January 18, 2005, Employee's driving privileges were reinstated. [28]

On cross examination, Employee testified that he was arrested on April 23, 2004 for DWI, convicted on May 13, 2004 and never mentioned that to anyone at the agency.[29]

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[24] See Tr.-Vol. 3 at pp. 63-65, 68, 72-73, 85-86, 88-89; EE-4, Official Order of Revocation effective 7/14/04 for conviction of Driving While Intoxicated.
[25] See Tr.-Vol. 3 at p. 95.
[26] See hearing transcript dated 5/2/06 (hereafter referred to as "Tr.-Vol. 4") at pp. 8-10, 25. Sometime in September, 2004, Peter Mitchell, Supervisor, questioned Employee regarding his driver's license problem.
[27] See Tr.-Vol. 4 at pp. 18, 26-29; EE-9, letter dated 10/7/04 requesting a restricted license; EE-10, Review of Application For Limited Occupational License dated 11/16/04.
[28] See Tr.-Vol. 4 at 42; EE-11, Traffic Adjudication decision.
[29] See Tr.-Vol. 4 at pp. 73, 79; EE-9, 5 Year Record Request.

Lottie Winters-Johnson (Acting Administrator, Human Capital Administration)

Ms. Winters-Johnson testified that she has been involved with the license verification program since 2002; and recently oversees the program to check for valid licensing of employees who are required to operate government vehicles under the Federal Motor Carriers statute. Employees should report, to their supervisors, any violations while operating any vehicle or working for the District government. Any suspension or revocation should be immediately reported. No other employees whose duties required a CDL had that license revoked as a result of a DWI conviction.[30]

On cross-examination, Ms. Winters testified that Agency policy recommends referral to the Employee Assistance Program (EAP) when it is aware of a first offense of off-duty use of alcohol.[31]

Peter Mitchell (Manager, Bates Road Transfer Station)

Mr. Mitchell testified that, pursuant to notification from Agency's Drug and Alcohol Section sometime in September, 2004, he questioned Employee regarding his suspended license. Employee was unaware of the license suspension. Mr. Mitchell advised Employee could not drive the equipment until he brought in documentation. Employee subsequently provided a document reflecting that his license was revoked. Employee did not request a transfer to a non-driving position.[32]

ANALYSIS AND CONCLUSIONS

Whether Agency was required to reassign Employee in lieu of termination.

Pursuant to a D.C. Court of Appeals decision, an Administrative Judge of this Office may reverse the Agency's decision if it was not in accordance "with law or applicable regulations."[33] Further, the Board previously found as follows:

> A collective bargaining agreement is a contract between an employer and a union for the purpose of establishing the conditions of employment.

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[30] See hearing transcript dated 7/7/06 (hereafter referred to as "Tr.-Vol. 5") at pp. 10-16; A-6, 49 USCS, Section 31303 (2005).

[31] See Tr.-Vol. 5 at p. 24; Agency Record (hereafter referred to as "AR") at Tab 6, p. 21, Control Substance and Alcohol Testing Policy (Policy), Section X, Disciplinary Action,. A. Consequences of Agency Violations(4)(d).

[32] See Tr.-Vol. 5 at pp. 36-38, 40, 44; AR at Tab 12, Position Description.

[33] *See District of Columbia Metropolitan Police Department v. Elton L. Pinkard,* 801 A.2d 86 (D.C. 2002).

> When such an agreement establishes guiding principles and nondiscretionary policy for a government agency, it has the effect of a regulation, and this Office has jurisdiction to interpret any provision of the agreement which pertains to an issue under review.[34]

In support of his argument that removal was not the appropriate penalty, Employee contends that Agency, through an agreement with the Unions regarding licensing problems, was obligated to reassign him instead of terminating him.[35] Specifically, Employee argues that Agency was required to reassign him to a vacant non-driving position, if his license problem could not be resolved. Agency, on the other hand, contends that it has discretion to choose, among three (3) options: reassignment, reduction in pay or termination, consistent with the MOA. Since there was a dispute between the parties regarding the interpretation of the contract language agreed upon, testimony was presented by the parties in order for this Judge to interpret the contract language and evaluate the issue.

The following provisions were the center of dispute regarding the aforesaid Memorandum of Agreement:

> 4. The Employer agrees that it shall allow CDL and Non-CDL employees time to remedy problems related to their license, including, but not limited to the following:
>
> | License Problem | Time Allowed to Remedy the Problem |
> |---|---|
> | No medical card for CDL drivers | 15 calendar days |
> | No CDL license (has regular license) | 30 calendar days |
> | No license ever issued | No time allowed-Immediate action to terminate |
> | License suspended | 30 calendar days |
> | License Revoked | No time allowed - Immediate action (reassignment, reduction in pay or termination) |
> | No ("G") endorsement to drive a government vehicle | 15 calendar days |
>
> 5. The Employer agrees that employees found not to have a valid driver's license shall be suspended from driving a vehicle requiring a CDL or regular driver's license and shall be given the time allowed in Section four (4) of this Agreement without loss of pay. The employee will be temporarily assigned other duties during the remedy period listed in Section four (4) of this Agreement.

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[34] *See Rousey and Jones v. Department of Consumer and Regulatory Affairs,* OEA Matter Nos. 1602-0114-90 and 1602-0115-90, *Opinion and Order on Petition for Review* (September 30, 1992), __ D.C. Reg. __. at 4.

[35] See footnote 6 and EE-1.

> 6. The Employer agrees that employees who are not able to remedy their driver's license problem(s) during the allowed time indicated in Section four (4) of this Agreement shall be transferred to a vacant position (that does not require a CDL or a regular driver's license) for which he/she meets the minimum qualifications. It is understood that during the transfer to a vacant position, an employee may be demoted if the vacant position pays less than their current salary. However, if an employee fails to meet the minimum qualifications for a vacant position or no vacant position is available, the employee shall be subject to disciplinary action up to and including termination.

Employee's contention that Agency, in accordance with Section six (6) above, was required to reassign him because his license problem could not be resolved, is misplaced. He ignores the phrase, "during the allowed time indicated in Section four (4)." As reflected in Mr. Green's testimony, said phrase is key to an employee's reassignment, pursuant to Section six (6). That phrase specifically spells out the remedy period (where there is one) and, for those *eligible* employees, requires transfer to vacant positions, under the circumstances therein. Employee's license revocation had *no time allowed* and, based on the witness testimony, there were three (3) options. Even though Ms. Milton's testimony was forthright, her interpretation of the Agreement, in this instance, was clearly in error. She was the only cosigner of the MOA who presented a different interpretation of the language.

Based on the plain language and an overall evaluation of witness testimony, there was no step-by-step process required prior to termination. This Judge, therefore, concludes that it was left to Agency's discretion, in accordance with Section 4 of the MOA, to initiate one of three (3) immediate actions: reassignment, reduction in pay, or termination.

Whether the Penalty Was Appropriate Under the Circumstances.

When assessing the appropriateness of the penalty, this Office is not to substitute its judgment for that of the agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment." *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 1915, 1916 (1985).

Employee's position required that he possess a valid Motor Vehicle Operator's permit, a D.C. Government Operator's permit, a Commercial Driver's License, Class B, and a valid Operating Engineer License, Class7B. His primary responsibility was to operate heavy construction equipment and drive heavy duty trucks or other engineering equipment; all of which required the exercise of sound judgment and operation in accordance with safety rules and regulations. His duties included, among other things, "operates equipment in accordance with the rules and regulations of the Department of Public Works; and responsible for the safety of

pedestrians while operating equipment and for the safety of employees working around equipment." Employee failed to meet those responsibilities when he did not disclose his license problems to his supervisor and continued to operate heavy equipment.[36]

Employee's arguments regarding Agency's failure to offer rehabilitation or a vacant position as required by its drug policy and the MOA are without merit. First, relative to Agency's drug policy, this Judge cannot ignore another provision which allows Agency to initiate a removal action, "in certain circumstances", without referring a driver to the Employee Assistance Program (EAP).[37] Under the circumstances here, Employee failed to disclose the DWI (which triggered the mandatory license revocation), in violation of federal regulations and subsequently blames Agency for its unwillingness to reassign him to a nondriving position. His nondisclosure was not only dishonest, but also showed his failure to take responsibility for his actions and the safety of others. Second, as explained above, Agency did not violate the MOA when Employee was removed from service.[38]

Further, this Judge had the opportunity to listen to the testimony of witnesses and to observe their demeanor as they testified. Having done so, this Judge found the testimony of Agency's witnesses to be more credible than that of Employee. Specifically, a number of factors, including, but not limited to his testimony, diminished Employee's credibility relative to the license revocation issue: 1) Employee testified that he was previously *aware* of pending legal action relative to his driver's license; and wondered why "nobody took" his license; 2) Employee's admission that he did not tell anyone about his arrest and conviction for the DWI charge; 3) Employee's request for Restricted License (EE-9) reflecting, *inter alia,* twice-weekly

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[36] See AR at Tab 12, Position Description.

[37] See Tr.-Vol. 5 at pp. 27-28; footnote 31, Agency file at Tab 6; X(A)(3) which reads: In certain circumstances, DPW may initiate disciplinary action, up to and including removal from employment without referring a CDL driver to EAP. Agency was precluded from questioning Ms. Winters-Johnson as to whether Employee was qualified for such referral as she was limited, as a rebuttal witness, to testimony regarding the policy itself.

[38] See footnote 8; 49 USCS, Section 31303 reads, in pertinent part:

> (a) Violations. An individual operating a commercial motor vehicle, having a driver's license issued by a State, and violating a State or local law on motor vehicle traffic control . . . shall notify the individual's employer of the violation . . . not later than 30 days after the date the individual is found to have committed the violation.
>
> (b) Revocations, suspensions, and cancellations. An employee who has a driver's license revoked, suspended or cancelled by a State, who loses the right to operate a commercial motor vehicle in a State for any period, . . . shall notify the employer of the action not later than 30 days after the date of the action.

court-ordered drug testing and his attendance in substance abuse/treatment groups (on seven occasions) prior to when Employee claims he became aware of the license revocation; and 4) Employee's signature on the Annual Record of Violations (Employee Self-Report) demonstrates his awareness that any convictions for traffic law violations must be reported to the employer.[39]

In addition, Employee attempted to show that he was treated differently from similarly situated employees, eg., those whose licenses were revoked based on medical disqualification, and who may have been reassigned in lieu of termination. Yet, that argument fails for three (3) reasons: 1) management's discretion under Section four (4) of the MOA to choose the action to take; 2) Employee's nondisclosure of his DWI conviction and license revocation while continuing to perform his duties operating heavy equipment; and 3) Employee's violation of the law is distinguishable from a medical disqualification.[40]

Agency and its employees, as well as outside contractors have a right to trust that a CDL driver, operating heavy equipment, is doing so with proper licensing and total control of his faculties (ie., not under the influence of alcohol or drugs). Employee violated that trust when he failed to disclose his license revocation and the earlier DWI conviction on which it was based. Clearly, the off-duty offense, which resulted in Employee's license revocation, adversely affected Employee's performance of his assigned duties and thereby, had a significant effect on service efficiency. Further, Agency considered prior discipline; however, there is no evidence that, prior to court-ordered counseling, Employee rehabilitated himself, a mitigating factor the agency could have also considered.

Selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office. Based on the totality of circumstances, this Judge concludes that the penalty promoted the efficiency of the service, was within the parameters of reasonableness, and should be upheld.[41]

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[39] See AR at Tabs 13, Employee signed the Annual Request for Driving Record and the Annual Record, certifying that he had no convictions for traffic law violations during the past 12 months, on 4/14/07, prior to the instant DWI arrest.

[40] See EE-9; and EE-10 which cites Title 18, DCMR, Sections 301.1 and 310.7. Employee's conviction mandated revocation of his driver's license, which, in turn, prohibited the issuance of a limited occupational license.

[41] See Tr.-Vol. 5 at p. 54. Agency also considered an unchallenged suspension.

ORDER

It is hereby Ordered that Agency's action in removing Employee is UPHELD.

FOR THE OFFICE:

MURIEL A. AIKENS-ARNOLD, ESQ.
Administrative Judge

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
SELENA WALKER,	)	
Employee	)	OEA Matter No. 1601-0133-06
	)	
v.	)	Date of Issuance: June 26, 2007
	)	
D.C. FIRE AND EMERGENCY MEDICAL SERVICES,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Administrative Judge
	)	

Frederic W. Schwartz, Jr., Esq., Employee Representative
Ross Buchholz, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Prior to her removal, Selena Walker ("the Employee") was employed by the District of Columbia Fire and Emergency Medical Services ("the Agency") as an Emergency Medical Technician ("EMT") DS-699-7. By notice dated June 16, 2006, the Employee was notified of Agency's proposal to remove her from service based on a charge of "any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operation". By letter dated July 10, 2006, Adrian H. Thompson, then Fire and Emergency Medical Services Chief, notified the Employee of Agency's final decision affirming Employee's removal effective on July 14, 2006. On August 10, 2006, the Employee timely filed a petition for appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the Agency's adverse action of removing her from service. A prehearing conference and multiple status conferences were held in this matter. During the course of these proceedings, I initially decided that an evidentiary hearing was required. However, after carefully considering the Employee's Motion for Summary Reversal, the Agency's Opposition to Employee's Motion for Summary Reversal, and Employee's Reply to Agency's Opposition to Her Motion for Summary Reversal, I have since decided that no further proceedings are warranted[1]. The record is now closed.

[1] Of note, I provided both parties an opportunity (verbally) to supplement their briefs in light of my

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 629.3 *id.* states:

> For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

ISSUE

Whether Agency's action of removing the Employee from service was done in accordance with applicable law, rule, or regulation.

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

The following findings of facts, analysis and conclusions of law are based on the documentary evidence as presented by the parties during the course of the Employee's appeal process with this Office.

The Employee contends that the Agency's adverse action of removing her from service should be reversed because the Agency failed to comply with Title V, Section 502, of the Omnibus Public Safety Agency Reform Amendment Act of 2004, D.C. Official Code § 5-1031 (2005 Supp.), which states that:

> Commencement of corrective or adverse action.
>
> (a) Except as provided in subsection (b) of this section, no

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decision to not hold an evidentiary hearing. Both parties verbally opted to proceed without submitting any other documents.

> corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department or the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department or the Metropolitan Police Department **knew or should have known of the act or occurrence allegedly constituting cause. (Emphasis added).**
>
> (b) If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department, the Office of the United States Attorney for the District of Columbia, or the Office of Attorney General, or an investigation by the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) of this section shall be tolled until the conclusion of the investigation.

The Employee further contends that by virtue of her position as an EMT with the Agency she is afforded the unique protection that is provided by D.C. Official Code § 5-1031. The Employee argues the Agency knew or should have known of the act or occurrence allegedly constituting cause "...no later than January 18, 2006... [yet] the action against [the Employee] was initiated on June 16, 2006, considerably beyond the statutory constraint." *See*, Employee's Motion for Summary Reversal at 8. Lastly, the Employee contends that since the instant matter did not lead to a criminal investigation of the Employee, D.C. Official Code § 5-1031 (b) is inapplicable to the instant matter.

The Agency does not dispute the validity or the applicability of D.C. Official Code § 5-1031 (a) to this matter. The Agency argues that the D.C. Official Code § 5-1031 (a) time limit did not toll in the instant matter until the District of Columbia Office of the Inspector General ("OIG") completed its investigation and report regarding this matter. The Agency further argues that D.C. Official Code § 5-1031 (a) had not tolled until the Agency had collected sufficient evidence to substantiate a removal action against the Employee. The Agency cites *Graves v. Office of Employee Appeals*, 805 A.2d 245 (D.C. 2002), as providing authority for this argument[2]. Considering the record as a whole, the Agency asserts that the commencement of its adverse action against the Employee should be considered timely in light of D.C. Official Code § 5-1031 (a). The Agency does not address whether D.C. Official Code § 5-1031 (b) is applicable to the instant matter. Based on the arguments as presented by the parties in their respective legal briefs, I find that D.C. Official Code 5-1031 (b) is inapplicable to the instant matter.

In order to better assess how D.C. Official Code § 5-1031 applies in this matter a timeline of salient (and tragic) events must be discussed in order to accurately ascertain when the Agency knew or should have known of the act or occurrence allegedly

[2] The substance of Agency's argument relative to the *Graves* decision shall be discussed in Note 9 *infra*.

constituting cause in the instant matter[3].

January 6, 2006

On this date, according to *Respondent Responses to the Appellant's Petition for Appeal*, the Employee, along with Firefighter/EMT Michael Deems responded to a medical call at 3859 Gramercy Street, Northwest for what was termed as a "man down" situation. The person who was the subject of this call was later identified as Mr. David Rosenbaum ("Rosenbaum" or "the patient"). Rosenbaum was initially classified as medical priority three[4]. According to Agency's regulations, a patient would normally be transported to the closest medical facility to an incident. Given the location of this incident, it is the Agency's position that the closest hospital to this incident was Sibley Hospital. However, Rosenbaum was actually transported to Howard University Hospital, which is in fact further away than Sibley Hospital, relative to 3859 Gramercy Street, Northwest. Tragically, Rosenbaum passed away as a result of the injuries he endured after he had been transported to Howard University Hospital.

On this same day, the Employee, among others, was required to submit a memorandum to Agency officials[5] regarding her actions in responding to the above referenced medical call. In a nutshell, the Employee relates that she responded to the aforementioned medical call and further relates that Rosenbaum was incoherent at the time of their arrival. She further relates that Rosenbaum was subsequently loaded onto a stretcher and after her partner Deems assessed Rosenbaum's condition as medical priority three, he was then transported to Howard University Hospital.

January 10, 2006

On this day, the Employee submitted another memorandum to then Agency Chief Adrian Thompson relative to the January 6, 2006, incident involving Rosenbaum. The sum and substance of this memorandum is not markedly different from Employee's January 6, 2006, memorandum with the notable exception that the Employee related that "[t]here was no particular reason for transporting [Rosenbaum] to Howard rather than Sibley."

January 11, 2006

On this day, the Employee submitted another memorandum relative to the January 6, 2006, incident involving Rosenbaum to a different Agency official[6], it reads as

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[3] The events that are listed in this Initial Decision are not all of the events that have occurred in the instant matter. The events listed herein are only the relevant events that must be assessed in order to reach an appropriate decision in this matter.

[4] "Patients are assigned a transport code based on their medical status... Code 3 is assigned to low priority patients with stable medical conditions." *See* Respondent's Responses to the Appellant's Petition for Appeal at Note 1.

[5] Amit Wadhwa, MD, Medical Director, was the Agency official to whom the responsive memorandum was addressed.

[6] This memorandum was addressed to Douglas L. Smith, Jr., AFC – Operations. This memorandum

follows:

> Based on the reports given by both E-20 and their F/F-EMT and my partner F/F-EMT Deems following their assessments, the patient was deemed a low priority and by protocol the patient was transported to Howard University Hospital. At no time was any suggestion given by F/F-EMT Deems as to what hospital the patient should be transported.

January 18, 2006

The Agency convened a panel ("Interview Panel") in order to interview all of the Agency's employees' who were on the scene responding to the aforementioned medical call. The Interview Panel consisted of the following persons: Douglas Smith, Assistant Fire Chief, Operations; Jerome Stack, Battalion Chief for Operations, EMS Division; Rafael Sa'adah, Acting Battalion Fire Chief for Services ("Sa'adah"), EMS Division; Theresa Cusick, General Counsel, Fire and Emergency Medical Services Department; and Dr. Walter Faggett, Acting Chief Medical Officer, D.C. Department of Health. The Interview Panel interviewed the following persons: Firefighter/EMT-B Reginald Chandler; Firefighter Anthony Fields; Firefighter/EMT-A Michael A. Roy; Firefighter/EMT-B Frelimo Simba; Firefighter/EMT-B Michael Deems; and the Employee.

The notes from this interview were codified in a seven page memorandum dated January 24, 2006, by Sa'adah ("Interview Memo"). The salient portions of the Interview Memo shall be reproduced and discussed below.

January 24, 2006

The aforementioned Interview Memo was sent to then Fire and Emergency Medical Services Chief Adrian H. Thompson ("Thompson") on this date. I take note that each page of this document is labeled "Confidential Prepared in Anticipation of Litigation" and as was stated previously, it memorialized and summarized the interview of the aforementioned Agency personnel who responded to the medical call at 3859 Gramercy Street, Northwest. Of paramount relevance to the instant matter are the notes of the interview of the Employee and Firefighter/EMT-B Michael Deems ("Deems").

The following is excerpted, in pertinent part, from the Interview Memo regarding the Employee's interview with the Interview Panel:

> [The Employee] states that she was driving A-18 for the first half of the 12-hour shift beginning the evening in question... [The Employee] reports that A-18 was at Providence Hospital after dropping off a patient when they received the dispatch for 3859

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incorrectly references the date as January 11, 2005. I find that this is a mere typographical error and that the corrected date should read January 11, 2006.

Gramercy Street, NW...

[The Employee] denies any involvement in patient assessment or patient care during the entire course of this call. She states: "My partner said: 'I've got it,' so I assumed he had it."...

[The Employee] states that [Deems] told her that the patient was a "[transport priority] Code 3." [The Employee] states that after checking hospital status, she decided to transport the patient to "Hospital 5" (Howard University Hospital). When asked why she chose this transport destination, [the Employee] stated variously: "I don't know," and "I don't remember." Asked if she remembers what other hospitals were open when she checked for hospital status, she stated: "I can't remember what other hospitals were open." Asked if she knew how to navigate to Sibley or Georgetown Hospital from upper northwest, she stated that she did.

Interview Memo at 4-5.

The following is excerpted, in pertinent part, from the Interview Memo regarding Deems' interview with the Interview Panel:

Deems states that the MPD officer asked him what hospital they would be transporting the patient to. [Deems] states that he told the MPD Officer that they were going to Sibley Hospital, as it was closest. He states that [the Employee] then said: "No, we are going to Howard."

When questioned further by the interviewers about the basis for the selection of Howard University Hospital as a transport destination, [Deems] states: "Look you want to know the truth? She [the Employee] told me before we reached the scene that 'We're going to transport this patient to Howard, because she needed to run her errands in that neighborhood, including going to the ATM and going by her house." He states that he ultimately deferred to [the Employee] on this issue because; "She was the ACIC (Ambulance Crewperson in Charge] and she has higher medical certification than me." He states that it was his understanding that because [the Employee] is an EMT-A and he is an EMT-B that she was the officer in charge of the unit and had authority over him.

[Deems] variously describes his mental impression of the patient being a [transport code] Priority 2 or Priority 3. He states that the final transport code of Priority 3 was assigned by [the Employee] and that she did not ask for his input. He states that [the

> Employee]: "Got lost leaving Gramercy St." and that he was giving her driving directions through the window in the back of the ambulance...
>
> [Deems] states that after leaving Howard University Hospital, [the Employee] then drove A-18 to the ATM and to her residence, where her child "came down and gave her some medicine while we waited outside." ...
>
> Interview Memo at 6-7.

The following is an excerpt from the Interview Memo regarding the Employee's follow-up interview with the Interview Panel[7]:

> During re-interview, [the Employee] was asked if she recalls telling her partner before arriving at Gramercy Street that she was going to transport the patient to Howard and then needed to go to the ATM and her residence. She replies that she "doesn't recall" this conversation. She admits that she "probably" went to the ATM after dropping off the patient at Howard, but "doesn't recall" going to any other destinations.
>
> Interview Memo at 7.

June 15, 2006

On this date, the OIG released to the Agency a special report titled "Emergency Response to the Assault on David E. Rosenbaum" ("OIG Report"). This report memorialized the findings of the OIG investigation into the District of Columbia government response in this matter, including but not limited to, the response by both the Agency as well as the Metropolitan Police Department. According to the OIG Report, the OIG investigation into this matter included reviewing and considering the aforementioned Interview Memo. As a result of the OIG Report, the Agency instituted the adverse action which underlies this Initial Decision.

June 16, 2006

On this date, by notice ("Proposed Removal Notice"), the Employee was informed of Agency's proposed adverse action of removing her from her position of record for the cause of "any on-duty or government-related act or omission that interferes with the efficiency or integrity of government operations". According to the Proposed Removal Notice, the facts and circumstances that support Agency's action are reproduced in relevant portion as follows:

> On January 6, 2006, you and your partner were dispatched on a

[7] I note that this follow-up interview occurred after the Interview Panel heard Deems' account of the matter.

> medical call to 3859 Gramercy Street, N.W. for a priority three patient. The closest available hospital was Sibley Hospital. However, you made the decision to transport the patient to Howard University Hospital. The OIG report found that you decided to transport the patient to Howard University Hospital for personal reasons. Specifically, the report found that you made the decision to transport to Howard University Hospital so that you could retrieve something from your home. This is in violation of the emergency medical protocols which require that patients be transported to the nearest appropriate hospital. District of Columbia Fire and EMS Emergency Ambulance Bureau states on page 26 section 15. A. Hospital Destination:
>
> > Refers to the medical protocol on selection of the hospital to which patients shall be transported to the closest appropriate emergency department. If because of compelling circumstances it is deemed necessary by the ACIC that the patient should be transported to a more distant emergency department, Medical Control will be established and authorization from the medical control physician obtained.
> >
> > This shall be fully documented on the F.D. 151 form...
>
> In your January 10, 2006, special report you stated that you "had no particular reason" for transporting to Howard University Hospital. **During a January 24, 2006 interview with Agency officials, you repeatedly stated that you "did not know" or "did not remember" why you went to Howard University Hospital. (Emphasis Added).**

After being notified of Agency's intent to proceed with said adverse action, the Employee went before a hearing officer and after receiving an adverse recommendation from the hearing officer and then a final notice of removal from the Agency, the Employee filed a petition for appeal with the OEA.

In defending the timeliness of the institution of its adverse action against the Employee[8], the Agency argues in pertinent part that:

> As a result of the OIG report, Agency 1) was able to resolve the discrepancy between Deems' statements and those of Employee, in favor of Deems; and 2) obtained previously undisclosed statements

[8] All Agency actions in the instant matter relate to the time requirements as enunciated in D.C. Official Code § 5-1031.

> from Employee that showed that she transported the patient to Howard for personal reason in violation of Agency protocols. Agency then knew of the act constituting cause for the adverse action and issued its Notice of proposed Removal the next day. Therefore, Employee's argument lacks merit.
>
> Agency's Opposition to Motion for Summary Reversal at 8. **(Emphasis in original)**.

As a result of Employee's allegedly admitting to the OIG that she did not follow Agency protocols relative to her choice of which hospital to transport the patient to, the Agency seemingly argues that it did not know of the facts and circumstances that constituted cause in this matter until the OIG issued the OIG report. However, Agency seemingly neglects to address D.C. Official Code § 5-1031 (a) in its entirety, which provides in pertinent part that "no corrective or adverse action against any sworn member or civilian employee of the [Agency] ... shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the [Agency] knew or should have known of the act or occurrence allegedly constituting cause". The Agency argues that it only knew of the act constituting cause after receiving the OIG Report. The question that remains then, is when the Agency *should have known* of the act or occurrence that supported Agency's adverse action.

As was stated *supra*, on January 18, 2006, the Agency convened an Interview Panel that conducted a series of interviews of all Agency personnel who responded to 3859 Gramercy Street, Northwest, on January 6, 2006.

According to the Interview Memo, the Interview Panel received conflicting accounts from the Employee and Deems. In the memo, the Employee stated that "after checking hospital status, she decided to transport the patient to 'Hospital 5' (Howard University Hospital). When asked why she chose this transport destination, [the Employee] stated variously: 'I don't know,' and 'I don't remember'." *See*, Interview Memo at 5.

Whereas Deems, in relating his version of events to the Interview Panel, states that: "Look you want to know the truth? She [the Employee] told me before we reached the scene that 'We're going to transport this patient to Howard' because she needed to run her errands in that neighborhood, including going to the ATM and going by her house." *See*, Interview Memo at 6. Deems goes on to state to the Interview Panel that "after leaving Howard University Hospital, [the Employee] then drove A-18 to the ATM and to her residence, where her child 'came down and gave her some medicine while we waited outside.'" *See*, Interview Memo at 7.

Given this conflicting account of events, the Interview Panel re-interviewed the Employee regarding her alleged conversation with Deems about deciding to transport Rosenbaum to Howard University Hospital prior to her arriving to 3859 Gramercy Street, Northwest, and her subsequent travels after completing said transport. The Interview

Memo notes that the Employee "doesn't recall" this conversation as well as her admitting to the Interview Panel that she "probably" went to an ATM after transporting Rosenbaum to Howard University Hospital. *See*, Interview Memo at 7. As was stated previously, the notes from the Interview Panel were memorialized in a confidential memorandum which was sent to Thompson on January 24, 2006.

Having evaluated Agency's step-by-step process, whereby it assessed the Employee's professional actions on the occasion of the patient's death, I find that Agency's argument, that it complied with the time limits as enunciated in D.C. Official Code § 5-1031 (a) because it *knew* of the act or occurrence that constituted cause in the instant matter only *after* it received the OIG report, lacks merit[9]. As it relates to the instant matter, I further find that all of the elements of the underlying cause of action came into existence on January 6, 2006, as the Employee responded to the medical call and allegedly violated Agency's rules regarding where to transport the patient under said circumstances. Based on the foregoing timeline of relevant events, I further find that the Agency, at the very least, *should have known* of the act or occurrence that supported its adverse action against the Employee on January 18, 2006, when the Interview Panel concluded its interview of all Agency personnel who responded to 3859 Gramercy Street, Northwest on January 6, 2006.

The Interview Panel consisted of several high ranking Agency personnel, including Douglas Smith, Assistant Fire Chief, Operations; Jerome Stack, Battalion Chief for Operations, EMS Division; Sa'adah; and Theresa Cusick, General Counsel, Fire and Emergency Medical Services Department; among others. It was during this interview process that the Agency was first made aware that the account of event as provided by Deems conflicted with the Employee's version of events. I note that the members of the Interview Panel are generally involved with assisting Thompson in managing the Agency's workforce in all aspects of the Agency's mission, including but not limited to recommending Agency employee's for corrective or adverse actions. As such, any of

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[9] Agency's attempt to buttress its argument by partially relying on *Graves* is unpersuasive. The Employee in Graves sole argument was, "that the period of 45 business days within which an adverse action could be commenced against him under the applicable provision of the CMPA, D.C. Code § 1-617.1 (b-1)(1) (1992) (repealed 1998) ... had expired by August 2, 1991. *Graves*, at 246. The Agency in *Graves* instituted its adverse action after it determined that it could prove the cause of "inexcusable absence without leave". *Id.* at 247. This was then defined by the D.C. Code and the District Personnel Manual (both being read in tandem) as being absent without official leave ("AWOL") for 10 consecutive days or more. The Agency waited for the Employee to not report to work for 10 consecutive days before considering his action as acceptable cause for removal. The Employee contended that the Agency knew before he was absent for 10 consecutive work days that it had cause for removal. As such, the employee in *Graves* argued that the Agency's commencement of its adverse action was untimely. Conversely, the Agency contended that since it waited until the Employee was AWOL for 10 consecutive days or more before attempting to impose its adverse action, that said action was timely. The Court ultimately agreed with the Agency, citing *Doe v. District of Columbia Comm'n on Human Rights*, 624 A.2d 440 (D.C. 1993), in noting, *inter alia*, that "a statute of limitation begins to run at the time the right to maintain the action accrues, i.e., from the time that all the elements of a cause of action have come into existence." Wherein in *Graves*, the elements of the cause of action did not accrue until he had been AWOL for 10 days or more, such is not the case in the instant matter.

these officials could (and/or should) have conducted further inquiry, investigation, or action in an efficient and expeditious manner, so as to potentially comply with the time limits for instituting such actions as mandated by D.C. Official Code § 5-1031.

As is mandated by D.C. Official Code § 5-1031 (a), I further find that the Agency, if it intended to do so, should have instituted its adverse action against the Employee within 90 days of January 18, 2006, not including Saturdays, Sundays, or legal holidays. By my calculation, this would require the Agency to have proposed said action on or before May 26, 2006.

"The starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 753, 756 (1975). "A statute that is clear and unambiguous on its face is not open to construction or interpretation other than through its express language." *Caminetti v. United States*, 242 U.S. 470 (1916); *McLord v. Bailey*, 636 F.2d 606 (D.C. Cir. 1980); *Banks v. D.C. Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992), _ D.C. Reg. __ ( ). The language within D.C. Official Code § 5-1031 is clear and unambiguous and its time limits are mandatory in nature, which considering the record as whole, the Agency failed to comply with.

In the instant matter, the Agency, through its Proposed Removal Notice dated June 16, 2006, informed the Employee of its proposed adverse action of removing her from her position of record. I further find that this date is well beyond the 90 day time limit as mandated by D.C. Official Code § 5-1031 (a) for instituting adverse actions against Agency employees.

Based on the foregoing, I CONCLUDE that the Agency's adverse action of removing the Employee from service must be REVERSED[10].

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of removing the Employee from service is REVERSED; and

2. The Agency shall reinstate the Employee and reimburse her all back-pay and benefits lost as a result of her removal; and

3. The Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the

[10] Because this initial decision is based solely on the legality of Agency's action relative to D.C. Official Code § 5-1031, I am unable to address the factual merits of this matter.

terms of this Order.

FOR THE OFFICE:

Eric T. Robinson, Esq.
Administrative Judge